Thor Choon Sim (as administrator for the estate of Cheong Kong Soon) v Unknown persons who are occupying/trading on the property known as No Hakmilik 38150, Lot No 74, Sek 20, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang (Soon Sim Yoke (trading as Wa Cofee, proposed intervener)

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO PA-24NCVC-686–08 OF 2019
AZIZAN MD ARSHAD JC
23 DECEMBER 2022

Civil Procedure — Intervener — Legal interest — Plaintiff obtained order for vacant possession of premises — Proposed intervener filed application to intervene pursuant to O 15 of Rules of Court 2012 — Proposed intervener filed application to be made second defendant in application under O 89 of Rules of Court 2012 — Whether applications under O 15 and O 89 of Rules of Court 2012 could be made in one application — Whether there was delay in applying to intervene — Whether proposed intervener had legal interest in property — Whether application under O 89 of Rules of Court 2012 was only limited to vacant possession — Whether order for vacant possession gave right to owner to demolish structure on land — Rules of Court 2012 O 15 r 6 & O 89

The plaintiff as the owner of a property located in Bandar Georgetown, Penang ('the property/premises') had brought an action against the defendants to obtain vacant possession of the property. The property was initially rented out to an individual known as Goh, but he had vacated the property but at the same time, the proposed intervener alleged that Goh had entered into agreement with him in relation to the said property. Even though the plaintiff herein had obtained an order for vacant possession of the property, the proposed intervener continued business activities in the said property. The proposed intervener then filed the present application to intervene ('encl 19') pursuant to O 15 r 6 of the Rules of Court 2012 ('the ROC') and at the same time, he had applied to be made the second defendant in the application under O 89 of the ROC. The issues for the court's consideration were: (a) whether the applications under O 15 and O 89 of the ROC could be made in one application; (b) whether there was delay in applying to intervene; (c) whether the proposed intervener had legal interest in the property; and (d) whether the application under O 89 of the ROC was only limited to vacant possession.

Held, dismissing encl 19 with costs of RM2,500 subject to allocator fee:

(1) Based on the provisions of O 89 and O 15 of the ROC, the required conditions were different. Under O 89 of the ROC, the applicant must

have possession of the land whereas under O 15 of the ROC, what needed to be shown was the existence of a legal interest. The proposed intervener's application to the court to make him the second defendant was contrary to the provisions of the law. For this reason alone, the application in encl 19 should be struck out (see para 15).

(2) In the present case, the application to intervene was made after the plaintiff intended to execute the order for vacant possession for the second time. Any dilatoriness on the part of the proposed intervener may well affect the exercise of discretion by the court hearing the application to intervene. In addition, any conduct by the proposed intervener which called into question their motives or bona fides would also impact upon the exercise of discretion. In the present case, there was a delay which warranted dismissal of encl 19 (see paras 18–20).

(3) Based on the proposed intervener's affidavits, there were documents related to the premises entered in his name. All of these documents were related to the address of the premises for conducting business. It was clear here that it was a commercial interest and not a legal interest. Further, the proposed intervener had initiated an action in the sessions court for a claim for damages related to the alleged damage to the premises. The claim was clearly for compensation for the premises and was not related to land ownership or legal interest (see paras 25 & 29).

(4) The claim that there was a legal interest in having entered into an agreement with Goh was also unfounded because, even if it existed, it would not bind the plaintiff. The binding agreement between the plaintiff and Goh also ceased to exist after it had been legally terminated. There was also no document to show any agreement between the proposed intervener and Goh. There was also no supporting document or in his affidavits that the landlord had entered into an agreement to allow the proposed intervener to stay on the said land. The court therefore could not accept the argument that the plaintiff had given permission to the proposed intervener to stay on the land based on the original agreement between the proposed intervener and Goh. The court further found that the proposed intervener failed to establish any equitable right in the present case (see paras 31–32).

(5) Based on the cases referred to, the court opined that the right to vacant possession also entitled the owner to demolish or move any structure or construction on the land and the owner was not prohibited from doing so under O 89 of the ROC (see para 36).

[Bahasa Malaysia summary

Plaintif sebagai pemilik hartanah yang terletak di Bandar Georgetown, Pulau Pinang ('hartanah/premis tersebut') telah memfailkan tindakan terhadap defendan-defendan untuk mendapatkan pemilikan kosong hartanah tersebut.

Hartanah tersebut pada mulanya disewakan kepada individu dikenali sebagai Goh, tetapi dia telah mengosongkan hartanah tersebut tetapi pada masa yang sama, pencelah yang dicadangkan mendakwa Goh telah menandatangani perjanjian dengannya berhubung dengan hartanah tersebut. Walaupun plaintif di sini telah mendapat perintah untuk pemilikan kosong hartanah tersebut, pencelah yang dicadangkan meneruskan aktiviti perniagaan di dalam hartanah tersebut. Pencelah yang dicadangkan kemudiannya memfailkan permohonan semasa untuk mencelah ('lampiran 19') menurut A 15 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan pada masa yang sama, dia telah memohon untuk dijadikan defendan kedua dalam permohonan di bawah A 89 KKM 2012. Isu-isu untuk pertimbangan mahkamah adalah: (a) sama ada permohonan di bawah A 15 dan A 89 KKM 2012 boleh dibuat dalam satu permohonan; (b) sama ada terdapat kelewatan dalam memohon untuk mencelah; (c) sama ada pencelah yang dicadangkan mempunyai kepentingan undang-undang dalam hartanah tersebut; dan (d) sama ada permohonan di bawah A 89 KKM 2012 hanya terhad kepada pemilikan kosong.

Diputuskan, menolak lampiran 19 dengan kos sebanyak RM2,500 tertakluk kepada bayaran alokatur:

(1) Berdasarkan peruntukan A 89 dan A 15 KKM 2012, syarat-syarat yang diperlukan adalah berbeza. Di bawah A 89 KKM 2012, pemohon perlu mempunyai pemilikan ke atas hartanah tersebut manakala di bawah A 15 KKM 2012, apa yang perlu ditunjukkan ialah kewujudan kepentingan undang-undang. Permohonan pencelah yang dicadangkan kepada mahkamah untuk menjadikannya defendan kedua adalah bertentangan dengan peruntukan undang-undang. Atas sebab ini sahaja, permohonan dalam lampiran 19 harus dibatalkan (lihat perenggan 15).

(2) Dalam kes ini, permohonan untuk mencelah dibuat selepas plaintif berhasrat untuk melaksanakan perintah bagi pemilikan kosong untuk kali kedua. Apa-apa kelewatan di pihak pencelah yang dicadangkan boleh menjejaskan penggunaan budi bicara oleh mahkamah yang mendengar permohonan untuk mencelah. Di samping itu, apa-apa kelakuan oleh pencelah yang dicadangkan yang menyebabkan motif atau bona fides mereka dipersoalkan juga akan memberi kesan kepada penggunaan budi bicara. Dalam kes ini, terdapat kelewatan yang mewajarkan penolakan lampiran 19 (lihat perenggan 18–20).

(3) Berdasarkan afidavit pencelah yang dicadangkan, terdapat dokumen-dokumen berkaitan premis tersebut yang dimasukkan atas namanya. Kesemua dokumen ini adalah berkaitan dengan alamat premis untuk menjalankan perniagaan. Jelas di sini bahawa ia adalah kepentingan komersial dan bukan kepentingan undang-undang. Selanjutnya, pencelah yang dicadangkan telah memulakan tindakan di

mahkamah sesyen untuk menuntut ganti rugi berkaitan dakwaan kerosakan premis. Tuntutan tersebut jelas untuk pampasan bagi premis tersebut dan tidak berkaitan dengan pemilikan tanah atau kepentingan undang-undang (lihat perenggan 25 & 29).

(4) Dakwaan bahawa terdapat kepentingan undang-undang apabila perjanjian dengan Goh dimeterai juga tidak berasas kerana, walaupun ia wujud, ia tidak akan mengikat plaintif. Perjanjian yang mengikat antara plaintif dan Goh juga tidak lagi wujud selepas ia ditamatkan secara sah. Tiada juga dokumen untuk menunjukkan apa-apa perjanjian antara pencelah yang dicadangkan dan Goh. Juga tiada dokumen sokongan atau dalam afidavitnya bahawa tuan tanah telah menandatangani perjanjian untuk membenarkan pencelah yang dicadangkan tinggal di tanah tersebut. Oleh itu mahkamah tidak dapat menerima hujah bahawa plaintif telah memberi kebenaran kepada pencelah yang dicadangkan untuk tinggal di tanah tersebut berdasarkan perjanjian asal antara pencelah yang dicadangkan dan Goh. Mahkamah selanjutnya mendapati bahawa pencelah yang dicadangkan gagal mewujudkan apa-apa hak saksama dalam kes ini (lihat perenggan 31–32).

(5) Berdasarkan kes-kes yang dirujuk, mahkamah berpendapat bahawa hak pemilikan kosong juga melayakkan pemilik untuk merobohkan atau memindahkan mana-mana struktur atau pembinaan di atas tanah dan pemilik tidak dilarang berbuat demikian di bawah A 89 KKM 2012 (lihat perenggan 36).]

Cases referred to

Ahmad Shazilly Ismail Bakti v Nik Salma Zaidah Hj Wan Mohd Zaid [2014] 5 CLJ 817, CA (folld)

Attorney-General of The Gambia v N'jie [1961] 2 All ER 504, PC (refd)

Badruzamani bin Azmi v Kurnia Insurance (M) Bhd [2001] 6 MLJ 481, HC (refd)

Cahaya Ideal (M) Sdn Bhd v Orang2 Yg Mengenali Diri Sbg 'Ponga' (Poongavanam a/l Vadivelu) & Ors [1999] MLJU 125; [1999] 3 CLJ 257, HC (refd)

Cahaya Ideal (M) Sdn Bhd v Orang2 Yg Menduduki Rumah Yg Ditanda Sbg 'A3' Dan Didirikan Atas Sebahagian Tanah Yg Dipegang Di Bawah Hakmilik CT 2733 Lot 2103 Mukim Plentong, Daerah Johor Bahru, Ng Johor [1998] MLJU 570; [1999] 1 CLJ 575, HC (refd)

Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors [2011] 1 MLJ 721, FC (refd)

Dato Narendrakumar Jasani a/l Chunilal Rugnath, Re v Shencourt Properties Sdn Bhd (in liquidation) (Ricky Thong Yew Fook, proposed intervener) [2022] 9 MLJ 907, HC (refd)

Eco Horizon Sdn Bhd v Penghuni-Penghuni Arulmigu Kuil Sri Maha Muthu Mariamman, Batu Kawan, Seberang Perai Selatan Yang Merupakan

Sebahagian HS(D) 50536, PT 5965, Mukim 13, Daerah Seberang Perai Selatan Pulau Pinang & Ors [2022] MLJU 2766, HC (refd)

Guanalan a/l Pechimutu v Jeya Prakash a/l Arasan (Pacific & Orient Insurance Co Bhd, applicant/intended intervener) [2021] MLJU 2285, Sc (refd)

Hasilharta (Malaysia) Sdn Bhd v Ideal Advantage Sdn Bhd & Anor [2022] MLJU 2974, HC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Jacy ak Tintang (suing on behalf of himself and/or behalf of the other proprietors, occupiers holders and claimants of Native Customary Rights (NCR) land located within Kampung Merdang Gayam, Jalan Dato Mohd Musa, 94300 Kota Samarahan, Sarawak) & Anor v Mayan ak Nayang [2022] 6 MLJ 153; [2022] 7 CLJ 682, CA (refd)

Kepong Development Sdn Bhd v Ng Bee Wan (dituntut sebagai pegawai awam bagi Persatuan Penganut Hock Sui Tong Kepong Kuala Lumpur) [2022] MLJU 2191; [2022] 1 LNS 2093, HC (refd)

Ku Nyet Lee v Sazone Development Sdn Bhd (Sanamas Sdn Bhd, applicant) [2021] MLJU 1666, HC (refd)

Lee Loy & Ors v Poh Kam Sang & Anor [2018] 3 MLJ 240, CA (refd)

Mohamed bin Ismail v Tan Sri Haji Osman Saat & Ors [1982] 2 MLJ 133; [1982] CLJ Rep 581 (refd)

Shaikh Sahied bin Talip bin Jaafar bin Talip v Khoo Kang Chek [1934] 1 MLJ 283 (refd)

Titular Roman Catholic Bishop of Penang v Stephen Ramachandran [1994] 3 MLJ 4; [1994] 4 MLRH 503, HC (refd)

Toh Kheng Heng & Anor v Ahmad Fauzi bin Mohd Taufek [1994] 1 MLJ 356, HC (refd)

Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63; [1992] 2 CLJ 1153; [1992] 1 CLJ 344, SC (refd)

Top Builders Capital Bhd & Ors, Re [2021] 10 MLJ 327, HC (refd)

UDA Sentosa Sdn Bhd v Jonathan a/l Sinnappan & Ors [2022] 7 MLJ 923, HC (refd)

Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd [1996] 2 MLJ 221, CA (folld)

Legislation referred to

Rules of Court 2012 O 15, O 15 r 6, O 89

Vaasudevan a/l Puspagaran (Mahen & Co) for the applicant.
Yiew De Xian (Goh Eng Kee & Co) for the respondent.

Azizan Md Arshad JC:

INTRODUCTION

[1] This is an application by the *pencelah yang dicadangkan* ('proposed intervener') to intervene in this suit pursuant to O 15 r 6 of the Rules of Court 2012 ('the ROC 2012'). This court had on 1 December 2022 dismissed the application with a cost of RM2,500. This is an appeal against the decision of this court. This judgment contains the reason for my decision. The parties are referred to as they were in the High Court.

THE CAUSE PAPERS

[2] The cause papers filed in respect of this application are as follows:

(a) the notice of application (encl 19) dated 8 August 2022;

(b) the proposed intervener's affidavit (encl 20) affirmed on 8 August 2022 ('proposed intervener's affidavit');

(c) the plaintiff's affidavit in reply (encl 22) affirmed on 29 August 2022 ('plaintiff's reply'); and

(d) the proposed intervener's affidavit in reply (encl 23) affirmed on 9 September 2022 ('proposed intervener's affidavit in reply')

BACKGROUND FACTS

[3] This suit was filed by the plaintiff as the legal owner of the premise known as Hakmilik No 38150, Lot 74, Seksyen 20, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang.

[4] The said premise was rented out to an individual by the name of Goh Hong Chin ('Goh') and a tenancy agreement was entered to this effect. However, Goh had vacated said premise on 31 October 2016. At the same time the proposed intervener has entered into an agreement with Goh. No agreement or any legal contract between the proposed intervener and the plaintiff.

[5] The plaintiff had subsequently obtained an order for vacant possession of the said premise on 23 September 2019. After obtaining a vacant possession order against the said premise, all the cause papers were served to all parties concerned to vacate it. No action was taken by the proposed intervener. The plaintiff had obtained a vacant possession of the said premise on 3 December 2019 However, the defendants (unknown persons) have again trespassed and the proposed intervener continued business activities at the premises [coffee

shop]. It is within the knowledge of the defendants and the proposed intervener of this order to vacant the premises at least by 3 December 2019.

[6] The proposed intervener had than decided to file a writ action to claim for damages of the premise via Civil Suit No PA-A72NCVC-3–01 of 202 (still pending in sessions court) and also to intervene in this suit.

THE LAW

[7] The relevant provision herein is O 15 r 6 of the ROC 2012:

> Misjoinder and non-joinder of parties (O 15 r 6)
>
> (1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (b) order any of the following persons to be added as a party, namely-
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

Cases

The relevant cases are as follows:

[8] In *Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors* [2011] 1 MLJ 721, states as follows:

> [23] The law in respect of evaluating intervener applications at first instance had been laid down by the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 (PC).

[24] The decision in Pegang Mining was adopted by the then Supreme Court in *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63; [1992] 2 CLJ 1153; [1992] 1 CLJ 344.

[25] In *Tohtonku Sdn Bhd* the then Supreme Court had this to say:

> *It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interests alone would be affected: per Lord Diplock in Pegang Mining Co Ltd v Choong Sam & Ors at pp 55–56.* (Emphasis added.)

[9] In the case of *Mohamed bin Ismail v Tan Sri Haji Osman Saat & Ors* [1982] 2 MLJ 133; [1982] CLJ Rep 581 which approvingly mentioned the following passages from Attorney General of the *Attorney-General of The Gambia v N'jie* [1961] 2 All ER 504:

> The words 'person aggrieved' are of wide import, and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because something has been done or omitted to be done contrary to what the law requires.

[10] In *Re Dato Narendrakumar Jasani a/l Chunilal Rugnath v Shencourt Properties Sdn Bhd (in liquidation) (Ricky Thong Yew Fook, proposed intervener)* [2022] 9 MLJ 907, held:

> On the issue of unreasonable delay in filing the motion, I hold that so long as it is proven that the proposed intervener's rights will be directly affected by the outcome of PW338 and the court has not yet made a decision in PW338, the issue of delay is not a material factor in determining an application to intervene as in the motion herein. Authority for this can be found in the Supreme Court case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 where it was held:
>
> > ... an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O 15 r 6 of the RHC 1980. The application may be made 'at any stage of the proceedings' *meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in.* The judge has also become functus officio. Even then, the application must be made promptly. Order 15 r 6 of the RHC 1980 applies to all civil proceedings whether commenced by a writ, motion or summons etc. (Emphasis added.)

[11] In *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 at p 645; [2008] 2 CLJ 121 at p 123 held that

> An application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O 15 r 6 of the Rules of High Court 1980 — 'The application may be made at any stage of the proceedings'

— meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in, the judge also becomes functus officio.

(See *Guanalan a/l Pechimutu v Jeya Prakash a/l Arasan (Pacific & Orient Insurance Co Bhd, applicant/intended intervener)* [2021] MLJU 2285.)

[12] In the case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* the Federal Court said:

[54] ...

[55] ...

[56] Thirdly, an application for leave to intervene is supported by an affidavit. In other words, in such an application, the judge merely decides on affidavit evidence, whether or not leave should be granted. At that stage, the judge should not make a definite finding of facts which, as envisaged by O 15 r 6 of the RHC, will and can only be made after all evidence has been adduced in the trial which will follow subsequently.

...

[65] ... In an application to intervene by a non-party in a proceeding all that a judge has to do is, first, *to determine whether there is a proceeding still pending*. Where a final order, in this case the order for sale, has been made and perfected clearly the proceeding has concluded. It is then too late to intervene under O 15 r 6(2)(b)(ii) of the RHC. (Emphasis added.)

[13] In *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327, held:

[59] In Ronelp, the English High Court held that it was a factor of significant weight that the proceedings in that case were already 'reasonably well advanced' when the application was made. The fact that proceedings have been commenced is a factor for the court and that *'the nearer the outcome of the proceedings, the greater the weight is to be attached to that factor'*. (Emphasis added.)

[14] In *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481, held:

It is clear that Kurnia had delayed in making its application to the sessions court. *It had allowed over a year to lapse before filing the application to be made 'an intervener' and, a fortiori, after the close of the plaintiff's case*. This could probably be construed as a waiver on Kurnia's part. Further, Kurnia would seem to have admitted that there was delay, as it had not offered any riposte or answer to the appellant's submission on that score. As such, this court could not but to hold that there was inordinate delay and that the delay was fatal to the respondent's case. (Emphasis added.)

ANALYSIS AND APPLICATION OF LAW AND CASES TO THE FACTS

Whether applications under O 15 and 89 can be applied together in one application?

[15] In this case, the proposed intervener has applied under O 15 r 6 of the ROC 2012 to intervene; at the same time also applying to be made the Second defendant in the application (encl 15) under Order 89 of the ROC 2012. Based on the provisions of O 89 and O 15 of the ROC 2012, the required conditions are different. For the conditions under O 89 ROC, the applicant must have possession of the land. For applications under O 15 of the ROC 2012, what needs to be shown is the existence of a legal interest. The proposed intervener's application to the court to make him the second defendant is contrary to the provisions of the law. For this reason alone, the application in encl 19 should be struck out. In the case of *Jacy ak Tintang (suing on behalf of himself and/or behalf of the other proprietors, occupiers holders and claimants of Native Customary Rights (NCR) land located within Kampung Merdang Gayam, Jalan Dato Mohd Musa, 94300 Kota Samarahan, Sarawak) & Anor v Mayan ak Nayang* [2022] 6 MLJ 153; [2022] 7 CLJ 682, the Court of Appeal, held that:

> [57] As alluded to earlier, O 89 r 5 of the ROC 2012 provides that any party seeking to be made a party to the proceeding must show that they are in occupation of the land.
>
> [58] Upon perusal of the appellants' affidavits, we found that they are not in occupation of the lands. The affidavits indicate that only two villagers had cultivated the land or used it for farming. They averred that they knew of people trespassing on the land since 2012. Yet no legal action was taken to exercise any 'measure of control to prevent strangers from interfering (see *Madeli Salleh* (FC). It is undisputed fact that even the appellants had been well aware of the unknown people on the lands and yet they did not take any immediate steps to make a police report that they were the occupant of the land and cultivated the same.
>
> Given that the appellants are not the occupant of the land they have no locus to bring this application pursuant to O 89 r 5.
>
> [59] *It is also germane to observe and it is also not disputed that the appellants had filed in one application seeking to be made co-defendant pursuant to O 89 r 5 and at the same time made an application to intervene under O 15 r 6 of the ROC 2012. It is trite that the requirements for each application are different. The requirements for an application to intervene under O 89 r 5 are separate from that of an application under O 15 r 6. Under O 15 r 6 requires the appellants to have legal interest. We are of the view that given the different legal consideration that underlies each application it is undesirable for two separate applications to be lumped into one notice of application.*
>
> [60] *In any event, even if the same could be made, which we must express our disagreement to the same, the appellant must pertinently abide by the requirements stated under O 15 rr 6 and 10 of the ROC 2012 to establish that they have a legal interest. In this case, we are mindful to state that the appellants had failed to establish their legal interest on theland (see Chong Fook Sin v Amanah Raya Bhd (as the administrator for*

the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors [2011] 1 MLJ 721; [2010] 7 CLJ 917 *(FC)).* (Emphasis added.)

[16] In this case, if the Court of Appeal does not agree with the findings of this court in para 15 above, this court based on the entire affidavit is still of the opinion that the proposed intervener failed to show an equivalent legal interest under O 15 r 6 of the ROC 2012. The full reasons are given in the following paragraphs.

Whether there is a delay in applying to intervene?

[17] For the delay in making this application, based on the facts of the case, the proposed intervener already had knowledge that there is an order for vacant possession at least by 3 December 2019. Despite that, the proposed intervener had decided not to take any action until the filing of encl 19. Only in 2021, he filed file a writ and had decided to intervene in 2022. When this application was filed, this was the second time the plaintiff had executed it.

[18] Needless to say, any dilatoriness on the part of the proposed intervener may well affect the exercise of discretion by the court hearing the application to intervene. Also, any conduct by the proposed intervener which calls into question their motives or bona fides would also impact upon the exercise of discretion.

[19] In the present case, the application to intervene was made after the order for vacant possession wants to be executed for the second time. The first order was executed but the premises were broken into despite being locked by the plaintiff based on a valid court order. There was a suggestion by the plaintiff that there was undue delay on the part of the proposed intervener and not bona fide. In *Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors*, the Federal Court held:

> [35] In addition, the intervener application must be made at first instance where the proposed interveners had knowledge of the proceedings in the High Court and the opportunity to take the necessary steps. (See *Tradium Sdn Bhd v Zain Azahari Zainal Abidin & Anor* [1995] 1 MLJ 668; [1996] 2 CLJ 270 and *Fairview Schools Bhd v Indrani Rajaratnam & Ors* [1998] 1 MLJ 99; [1998] 1 CLJ 285.
>
> [36] In this regard 'opportunity' must be understood as meaning legal avenue and entitlement to make such an application. Quite apart from the requisite 'legal interest', an applicant must establish that he is not precluded by any other circumstances from making such an application.
>
> [37] Such precluding circumstances would include a prior determination of the courts that gave rise to an issue estoppel such as to attract the doctrine of res judicata. A party so impeded would not be in a position to seek leave to intervene.

(See *Ku Nyet Lee v Sazone Development Sdn Bhd (Sanamas Sdn Bhd,*

applicant) [2021] MLJU 1666.)

[20] Although there is a delay and this application can be dismissed on that basis, this court is of the opinion that if the delay factor is reasonable, then the issue of whether the proposed intervener has a legal interest or just a commercial interest in the application.

Whether proposed intervener has a legal interest on the premises/property?

[21] In this case, the proposed intervener submitted that there was a mutual agreement with Goh and that he had obtained permission to rent the premises. He also got permission from the Jabatan Bangunan (Buildings Authority) to renovate the premises and was not objected by plaintiff and even got permission from him. The proposed intervener has also shown in the Affidavit that all water and electricity bills are in his name.

[22] On the other hand, the plaintiff submits that the plaintiff had than obtained an order against the said Goh via Civil Suit No PA-A72–18–03 of 2016 for termination of the tenancy agreement as well as for vacant possession of the said land. At no material time was there any agreement for the proposed intervener to take conduct of the business. In fact, the plaintiff was not aware that the proposed intervener had taken conduct over the business.

[23] The proposed intervener and the individual known as Goh are in fact the same entity and a judgment has already been obtained against them for vacant possession. It also submitted that the proposed intervener has no legal right on the said premise and if any, there is only commercial interest for building (the shed). In regards to the commercial interest, it is submitted that the proposed intervener had initiated a separate suit to claim for damages of the said shed and are now attempting to obtain two bites of the cheery by intervening here as well. In the case of *Lee Loy & Ors v Poh Kam Sang & Anor* [2018] 3 MLJ 240, the Court of Appeal held that:

> *The appellants could not be allowed to approbate and reprobate at the same time — on the one hand, resisting the summary application and arguing that they were more than squatters and had a right to stay; on the other hand, implicitly acknowledging (eg by their TOL application) that they had no right to occupy the land and applying to court to compel the respondents to sell the land to them for not more than RM1.5m or, alternatively, that they be given time to vacate (see paras 38–39 & 41).* (Emphasis added.)

[24] In his case is also the termination of the agreement between the plaintiff and Goh is valid, then the plaintiff has full possession and the proposed intervener has no legal interest or legal possession over the premises. In *Shaikh Sahied bin Talip bin Jaafar bin Talip v Khoo Kang Chek* [1934] 1 MLJ 283 where

Simpson J observed that:

> Possession is primarily divisible into possession in fact (physical control) and possession in law'). What we mean to say is that although the main contractor may not have possession, in fact, it may still retain possession in law. Applying it to the present situation, it is not in dispute that Autoways did, in actual fact, vacate the site. *Hence, the appellant did indeed take over the site upon the said termination. Accordingly, the appellant did physically have possession of the site … This is what we mean by possession, in fact. However, legal possession remained with Autoways because the PAM Contract was not validly terminated. This is what we mean by possession in law.* (Emphasis added.)

(See also *Hasilharta (Malaysia) Sdn Bhd v Ideal Advantage Sdn Bhd & Anor* [2022] MLJU 2974.)

[25] The court is now looking at the affidavits filed by both parties. Based on the proposed intervener's affidavits, there are documents related to the premises entered in his name. All of these documents are related to the address of the premises for conducting business. It is clear here that it is a commercial interest and not a legal interest. The fact that the proposed intervener has initiated an action in the sessions court for a claim for damages related to the alleged damage to the premises. The claim is clearly for compensation for the premises and is not related to land ownership or legal interest.

[26] In *Lee Loy & Ors v Poh Kam Sang & Anor* the Court of Appeal affirmed the decision of the High Court which granted summary possession of the subject land under O 89 of the ROC. The High Court had held that supply of water and electricity does not connote permission to occupy the subject land. The findings of the High Court were cited as follows:

> [17] First, the court cannot force the respondents to sell the subject land at a price that the parties have never agreed to. Second, the six-year period requested by the appellants was unreasonably long bearing in mind the appellants who were clearly squatters had unlawfully occupied the subject land for an already long period; and that such occupation was prejudicial to the respondents' right of enjoyment of the subject land. Third, the court should not protect squatters, as decided by the Federal Court in *Sidek bin Haji Muhammad & 461 Others v The Government of the State of Perak & Others* [1982] 1 MLJ 313. *Next, the provision of electricity and water supplies does not amount to acknowledgment of lawful occupation of the subject land. Finally, the appellants have never challenged the respondents' title to the subject land or their validity of title. All that was challenged was that permission to occupy the subject land had been allegedly given by first the deceased, and later the respondents. There was however, no evidence to substantiate such claims.* (Emphasis added.)

[27] In *Cahaya Ideal (M) Sdn Bhd v Orang2 Yg Mengenali Diri Sbg 'Ponga' (Poongavanam a/l Vadivelu) & Ors* [1999] MLJU 125; [1999] 3 CLJ 257, the High Court held that payments of quit rent, assessment, electricity and water bills cannot be used as barometers to gauge ownership of land. The court said

(at pp 288–289):

> There the court held that payments of quit rents, assessment rates, electricity and water bills cannot be used as barometers to gauge ownership of lands without cogent supportive evidence in that direction. The court too held that the payments of quit rents and assessments can never give the persons who make those payments titles to those parts or portions of the land.
>
> ...
>
> The water and electricity supplies accorded to the defendants cannot confer any equity or interest on the defendants binding on the plaintiff.

(See *UDA Sentosa Sdn Bhd v Jonathan a/l Sinnappan & Ors* [2022] 7 MLJ 923.)

[28] On the allegations that the proposed intervener has received approval from the landlord, which is Cheong Phee Fatt and the plaintiff, the court has examined the document which is said to have been given by the owner of the land, ie Cheong Phee Fatt and plaintiff. Based on the document, the permission given was not by the plaintiff himself but by the administrator of the joint estate only, ie Chong Phee Fatt. Based on the affidavit, it is clear that the plaintiff never gave permission to the proposed intervener to build or encourage him to repair the premises as alleged.

Legal interest, commercial interest and equitable interest of the proposed intervener

[29] In determining whether the proposed intervener has a legal interest or a commercial interest is very important. After perusing the proposed intervener's affidavits, this Court is satisfied that this application is a commercial interest and not a legal interest. Application based on commercial interest is a not a strong reason. This has been decided in the case of *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63; [1992] 2 CLJ 1153; [1992] 1 CLJ 344.

[30] In *Tohtonku Sdn Bhd* the then Supreme Court had this to say:

> *It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interests alone would be affected*: per Lord Diplock in *Pegang Mining Co Ltd v Choong Sam & Ors* at pp 55–56. (Emphasis added.)

[31] The claim that there is a legal interest in having entered into an agreement with Goh is also unfounded because, even if it exists, it will not bind the plaintiff. The binding agreement between the plaintiff and Goh also ceases to exist after it has been legally terminated. There is also no document to show any document of agreement between the proposed intervener and Goh. There is also no supporting document or in his affidavits that the plaintiff or Cheong Phee Fatt has entered into an agreement to allow the proposed intervener to stay on the said land. This court cannot accept the argument that the plaintiff

has given permission to the proposed intervener to stay on the land based on the original agreement between the proposed intervener and Goh as alleged. In the case of *Lee Loy & Ors v Poh Kam Sang & Anor*, held that:

> (2) *The appellants claimed that each of them was given consent, licence or permission to enter and occupy the land by the deceased during his lifetime. But this claim was not borne out by the evidence offered by the appellants in their affidavits.* Many, if not all, of the appellants had, in fact, only occupied the land after the death of the deceased in 1975. Apart from the tenth appellant, in respect of whom no information was offered, and the third appellant, the claims of the other appellants simply could not stand. *This serious discrepancy severely undermined the credibility and veracity of the appellants. The High Court was right to hold that the appellants' claims that their entry and occupation of the land was with the consent, permission or licence of the deceased were without merit* (see paras 37 & 42–44). (Emphasis added.)

[32] In this case, the proposed intervener was unable to demonstrate any equitable right in this case. This court is guided and adopts the principles in the case of *Ahmad Shazilly Ismail Bakti v Nik Salma Zaidah Hj Wan Mohd Zaid* [2014] 5 CLJ 817, where the Court of Appeal held that:

> [68] What then is the right of a registered proprietor of land vis a vis an exclusive gratuitous licensee in terms of vacant possession of his land? In *Cahaya Ideal (M) Sdn Bhd*, Abdul Malik Ishak J held:
>
> > *Once the plaintiff proved its title and intention to regain possession, it was for the defendant to prove that she could set out a title or a right to possession inconsistent with the plaintiff's ownership. The burden is on the defendant to* show that she had the right to occupy the land on a balance of probabilities.
>
> [69] In *Toh Kheng Heng & Anor v Ahmad Fauzi Mohd Taufek* [1994] 1 MLJ 356; [1994] 1 CLJ 547, the High Court took a similar view. In that case, the plaintiffs were the registered owners of a piece of land which they claimed that they had bought from the previous owner with vacant possession. The plaintiffs later entered into a sale and purchase agreement to sell the land and subsequently visited the land and discovered that the defendant and others were in occupation of it. The plaintiffs then issued a notice to quit on the defendant requiring him to give up vacant possession or to vacate the house he was occupying within two months from the date of notice. Despite the notice to quit, the defendant failed to give up possession of the land. *The plaintiffs therefore filed an application under O 89 of the Rules of the High Court 1980 for an order that the plaintiffs be given possession of the land. The plaintiffs claimed that the defendant and the others were in occupation of the land without their consent, licence or agreement and also without the consent of the authorities and the plaintiffs claimed that the occupation of the land was unlawful.* The defendant filed an affidavit in reply stating, inter alia, that the notice to quit served upon him was not valid under the law as he had an equitable right to occupy the land.
>
> [70] *In allowing the plaintiffs' application, the court held, inter alia, that the defendant himself did not seek to confer or claim any higher status as to his occupation of the land than as a licensee. He was therefore a gratuitous licensee and, in that capacity, his licence*

to occupy the land was properly terminated when the notice to quit was served on him. Thereafter the defendant became a trespasser on the land and the plaintiffs were entitled to apply under O 89 of the RHC for the defendant to quit the land. In the course of arriving at its decision, the court held as follows:

> Even if the defendant was allowed to occupy the land by the plaintiffs' predecessors-in-title and subsequently by the plaintiffs themselves, the defendant was only a gratuitous licensee and the consent of the plaintiffs' predecessors in-title or that of the plaintiffs to his occupation of the land did not have the effect of conferring upon him any rights in equity. He was a sojourner on the land at the will of the plaintiffs' predecessors-in-title and subsequently at the will of the plaintiffs. Upon the issue of the notice to quit on 24 November 1992 and its crystallization two months later, the defendant ceased having any right to remain on the land, his licence to occupy the land having been lawfully terminated.

(See also *Chuan Seng Sdn Bhd v Ooi Boon Lai & Ors* [1993] 3 CLJ 153.) (Emphasis added.)

[33] In *Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [1996] 2 MLJ 221 where it was held as follows:

> The fallacy that lies at the heart of this rather ingenious argument lies in the proposition that consent or licence to occupy land may only be given by one who is empowered by law to give such consent or to grant such a licence. In the ordinary case, it is the registered proprietor, in whom is vested the right of ownership, who may give consent or grant a licence to occupy. However, cases may arise where the registered proprietor has placed such power in the hands of some other person, for example, a tenant of the land in question. In such a case, the consent or licence granted by that other may bind the registered proprietor and so render the occupation by the occupier lawful.

In our case, the termination of the contract between the plaintiff and Goh is valid and at the same time there is no binding agreement between the plaintiff and the proposed intervener. On this issue, based on the facts of this case, the principle in the case of *Ahmad Shazilly Ismail Bakti* and *Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [1996] 2 MLJ 221 are applicable.

Whether the application under O 89 of the ROC 2012 is only limited to vacant possession?

[34] At the same time, the proposed intervener said that this court cannot allow the order to demolish its premises (encl 15). The proposed intervener depends on the High Court case, which is *Titular Roman Catholic Bishop of Penang v Stephen Ramachandran* [1994] 3 MLJ 4; [1994] 4 MLRH 503, held:

> It is further observed that the plaintiff not only applied for possession of the premises on the land but also for an order that '... the defendant(s) ... comply with

> the notice issued by the Majlis Perbandaran Pulau Pinang... by forthwith demolishing the illegal structure mentioned in the said notice...' erected on the land. The application of the plaintiff for this additional relief is clearly not within the scope of O 89 and should not have been included in the application as the only claim that could have been made was for the recovery of possession of the land. The authors of The Supreme Court Practice 1988 comment as follows on the scope of the English O 113 at para 113/1—8/1 in vol 1: In proceedings under this Order, the only claim that can be made in the originating summons is for the recovery of possession of land; notwithstanding O 15 r 1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r 1. Therefore, the further relief for the demolition of the illegal structure on the land should not have been sought as such relief is not within the scope of proceedings under O 89. This is even more so in the light of the admission on behalf of the plaintiff that it was never alleged that it was the defendant himself who built the illegal structure on the land.

[35] Although at this stage, the court found this issue to be pre-mature to be raised because the proposed intervener is still not the second defendant as applied in encl 19, the court still gives an opinion related to the issue as follows:

(a) the decision referred to is a decision of the High Court which is not binding on this court; and

(b) there are other decisions of the High Court that allow the order to vacate the premises as well as demolish the premises or buildings on the land involved. Among the related cases are as follows:

(i) *Toh Kheng Heng & Anor v Ahmad Fauzi bin Mohd Taufek* [1994] 1 MLJ 356, held that:

> It was contended on behalf of the defendant that there were special circumstances in this case which merited a stay and the case of *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* was cited in support. The same case as well as *Serangoon Garden Estate Ltd v Ang Keng* were cited as authorities to resist the application for stay. *The defendant claimed that should my order of 2 October 1993 be put into effect, the house which he was occupying on the land would be demolished and any appeal to the Supreme Court even if successful would be rendered nugatory. It would not be possible to put him back into the same position as he had been in before.*
>
> In my view, this by itself was not a special circumstance for me to order a stay of execution. *The same argument could be raised in virtually all cases for possession of land under O 89 where the occupier thereof has to be evicted pursuant to a court order and any building erected thereon consequentially demolished. It would therefore lead to a situation where the intention of the legislature in providing for the O 89 procedure to be*

adopted to bring summary proceedings for possession of land would be defeated.

On the existence of the order of this court dated 19 May 1998 which had not been stayed, I am reminded of the sage words of Tun Abdul Hamid Omar, Lord President of the Supreme Court, in the case of *Wee Choo Keong v Mbf Holdings Bhd. & Anor And Another Appeal* [1993] 3 BLJ 123:

It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require his obedience. His duty is one of obedience until such time as the order may be set aside or varied. (Emphasis added.)

(ii) *Cahaya Ideal (M) Sdn Bhd v Orang2 Yg Menduduki Rumah Yg Ditanda Sbg 'A3' Dan Didirikan Atas Sebahagian Tanah Yg Dipegang Di Bawah Hakmilik CT 2733 Lot 2103 Mukim Plentong, Daerah Johor Bahru, Ng Johor* [1998] MLJU 570; [1999] 1 CLJ 575, held :

Any person who fails to obey an order of court runs the risk of being held in contempt with its attendant consequences.

The order of this court dated 19 May 1998 as extracted in encl 9 was a good order and it was never set aside. With that order the house was legally demolished and so the whole bone of contention became academic. (Emphasis added.)

(iii) *Kepong Development Sdn Bhd v Ng Bee Wan (dituntut sebagai pegawai awam bagi Persatuan Penganut Hock Sui Tong Kepong Kuala Lumpur)* [2022] MLJU 2191; [2022] 1 LNS 2093, held:

...

(d) An order that, subject to its equity be satisfied, *the defendant is to relocate the Temple and deliver vacant possession to the plaintiff on or before 01.02.2023*;

(e) An order that the defendant do all that is necessary to remove the said Temple from the Said Lands and/or alternatively that the plaintiff be given permission to take necessary steps *to remove the defendant and/or said Temple from the Said Lands after 01.02.2023.* (Emphasis added.)

(iv) *Eco Horizon Sdn Bhd v Penghuni-Penghuni Arulmigu Kuil Sri Maha Muthu Mariamman, Batu Kawan, Seberang Perai Selatan Yang Merupakan Sebahagian HS(D) 50536, PT 5965, Mukim 13, Daerah Seberang Perai Selatan Pulau Pinang & Ors* [2022] MLJU 2766, held that:

> [110] In my view, this whole process of resubmitting plans and obtaining consent or permission from the State will take more than 120 days anyway. In relation to this order to vacate, *I will also order that should the defendants for any reason refuse to relocate the said Temple/vacate in that period of 120 days, in default thereof, the plaintiff shall liaise with the Hindu Endowment Board and/or the Malaysian Hindu Sangam for the proper removal and relocation of the deities without any interference/obstruction of the defendants.* (Emphasis added.)

[36] Based on the cases referred to, this court opined that the right to vacant possession also entitles the owner to demolish or move any structure or construction on the land owned and is not prohibited from doing so under O 89 of the ROC 2012.

[37] Throughout the hearing of encl 19, both learned counsels have assisted this court in deciding the issues raised based on the arguments and related cases. This court appreciates it.

CONCLUSION

[38] In a nutshell, this court found that the proposed intervener does not have the legal interest in the subject matter of this case. No reason to grant the application to intervene. This court is bound to follow the Court of Appeal and Federal Court's decision regarding the proposed intervener's interest in the property. Applying the above cases, the proposed intervener has to prove on a balance of probabilities that he has a right to occupy the said premises by way of authorization by the plaintiff.

[39] Based on the aforesaid reasons, this court hereby dismissed the application (encl 19) with costs of RM2,500 subject to allocator fee.

Enclosure 19 dismissed with costs of RM2,500 subject to allocator fee.

Reported by Dzulqarnain Ab Fatar